

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AYYUB SHEIKH, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
TRAVELERS PERSONAL	:	
INSURANCE CO.,	:	No. 06-1477
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J.

August 31, 2007

Plaintiff Ayyub Sheikh, along with his family, Plaintiffs Amna Khalid, Maheen Ali, Heider Ali and Zainab Ali, brings this action against Defendant Travelers Personal Insurance Company (“Travelers”) alleging that Travelers failed to pay insurance benefits properly owed under Ayyub Sheikh’s automobile insurance policy. Plaintiffs raise claims for breach of contract, bad faith, fraud, and violations of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). Presently before the Court is Defendant’s motion for summary judgment. For the reasons discussed below, the motion is granted.

I. BACKGROUND

In April 2005, Ayyub Sheikh received an advertisement for Travelers automobile insurance with his Capital One credit card statement. (Pls.’ Resp. to Def.’s Mot. for Summ. J. [hereinafter Pls.’ Resp.] Ex. A (Sheikh Dep.) at 28-30.) Because Sheikh’s policy with American Independent Insurance was about to expire, and because he had seen ads for Travelers on television, Sheikh decided to call the number on the advertisement and inquire about obtaining a policy. (*Id.* at 25-26,

34.) Sheikh was satisfied with the deal he was offered over the phone and purchased a one-year plan to become effective the following day. (*Id.* at 32, 39.) Sheikh paid the \$505 fee by credit card over the phone. (*Id.* at 36; Pls.’ Resp. Ex. D (Sheikh Chase Credit Card Statement).) A temporary insurance card was immediately faxed to Sheikh and he received a permanent insurance card and a copy of his policy approximately seven to ten days later. (Pls.’ Resp. Ex. A at 38, 43.) Over the following weeks, Sheikh amended his policy twice: (1) on April 22, 2005 he added a new vehicle to his policy; and (2) on May 5, 2005 he added collision and comprehensive insurance and rental car coverage. (*Id.* at 45-46; Pls.’ Resp. at 5.) Sheikh’s credit card was charged \$652 for these upgrades. (Pls.’ Resp. Ex D (Sheikh Capital One Statement).)

Sheikh did not know that, before he upgraded his coverage in May, Travelers had sent him a “warning letter” on April 28, 2005 informing him that he had failed to make himself available for an underwriting interview despite Travelers’s multiple attempts to contact him. (Def.’s Mot. for Summ. J. [hereinafter Def.’s Mot.] Ex. G (Warning Letter) & Ex. C (McGilpin Aff.) ¶¶ 3-4.) As a result, Travelers planned to cancel Sheikh’s policy. (*Id.*) On May 6, 2005, Travelers followed up with a second letter, which stated: “As part of our business process, we verify policy information through an interview. As you have not responded to our requests for an interview, your policy is cancelled as of [May 28, 2005].”¹ (Def.’s Mot. Ex. B (Cancellation Letter).) The letter went on to state that if Sheikh contacted Travelers prior to the cancellation date, there was a possibility of reinstatement. (*Id.*)

Sheikh avers that he never received either of these letters nor any other communications from

¹ The parties dispute whether Travelers tried to contact Sheikh prior to issuing the notice of cancellation. (*See* Def.’s Mot. at 2; Pls.’ Resp. at 4.)

Travelers informing him of the cancellation; in particular, he avers that when he called to upgrade his insurance, the Travelers representative made no mention of the pending cancellation and accepted payment for the upgrade.² (*See* Pls.' Mot. Ex. G (Sheikh Aff.) ¶¶ 4-5, 7.)

On the evening of June 6, 2005, Sheikh and his whole family were driving on Route 95 South near Linden, Pennsylvania, when they were struck from behind by a hit-and-run driver. (Pls.' Resp. Ex. A at 106.) Each family member incurred injuries in the accident and damage was done to the rear bumper of the vehicle. (*Id.* at 116; Pls.' Resp. Ex. B (Police Report).) Sheikh called Travelers that day, and a representative gave him a claim number. (Pls.' Resp. Ex. A at 106.)

The following day, Sheikh was contacted by a different Travelers representative who informed him that his insurance had been cancelled prior to the June 6, 2005 accident and that he was not entitled to benefits. (*Id.*) Sheikh later received a refund check, dated June 6, 2005, for his initial payments on the policy. (*Id.*)

Based on the facts recited above, Plaintiffs filed an eight-count complaint alleging breach of contract, bad faith, violation of Pennsylvania's UTPCPL, and fraud and misrepresentation. Defendant has moved for summary judgment on all counts, arguing that Plaintiffs are not entitled to benefits under the policy because it was effectively cancelled prior to the date of Plaintiffs' accident. Plaintiffs argue that they never received notice of the cancellation and, as such, they should be fully covered by Defendant for the accident.

² Sheikh states that he received a packet from Travelers in conjunction with the second car he added to his policy. He denies, however, receiving any notice of cancellation with that packet. (Pls.' Mot. Ex. A at 78.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Id.* at 248. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Pøds .*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

A. Plaintiffs' Breach of Contract Claims Fails

Under Pennsylvania law, automobile insurance policies in existence for less than sixty days are exempt from the rigors imposed by Pennsylvania's statutory insurance scheme; an insurance company may effectively cancel a policy in issuance for fewer than sixty days, so long as that insurer "provides the insured with a written statement of the reason for cancellation." 40 PA. CONS. STAT. ANN. § 991.2002 (2007); *see also Morrison v. Mountain Laurel Assurance Co.*, 748 A.2d 689, 691

(Pa. Super. 2000). The language in Sheikh's policy reflected this statutory provision. (*See* Def.'s Mot Ex. A (Sheikh Policy) at 14 ("We may cancel [this policy] by mailing to the named insured . . . if notice is mailed during the first 60 days this policy is in effect . . .").)

Defendant argues that its May 6, 2005 letter provided adequate written notice of and sufficient reason for cancellation of Sheikh's policy. In support of its motion for summary judgment, Defendant invokes Pennsylvania's evidentiary "mailbox rule."

1. The Mailbox Rule

The mailbox rule is a rebuttable evidentiary presumption which provides that "the depositing in the post office of a properly addressed letter with prepaid postage raises a natural presumption, founded in common experience, that it reached its destination by due course of mail."³ *Commonwealth v. Thomas*, 814 A.2d 754, 758 (Pa. Super. 2002); *see also Meierdierck v. Miller*, 147 A.2d 406, 408 (Pa. 1957). Once a party produces evidence showing that a letter was mailed, it creates a rebuttable presumption that the letter was received. *Breza v. Don Farr Moving & Storage*, 828 A.2d 1131, 1135 (Pa. Super. 2003). Evidence of mailing may include direct evidence or that of business custom. *Kelly v. Allstate Ins. Co.*, 138 F. Supp. 2d 657, 662 (E.D. Pa 2001). The presumption that a letter was mailed is not rebutted solely by testimony denying receipt of the item; further corroboration is required. *Breza*, 828 A.2d at 1135; *Bell*, 2005 WL 1353527, at *8; *see also Donegal Mut. Ins. Co. v. Ins. Dep't*, 719 A.2d 825, 827 (Pa. Commw. 1998) (testimony of non-receipt by disinterested third party, whose letter was allegedly sent in same mailing as plaintiff's

³ "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law." FED. R. EVID. 302. Because Pennsylvania state law provides the rules of decision in this action, Pennsylvania's evidentiary presumptions apply. *See, e.g., Bell v. Allstate Ins. Co.*, Civ. A. No. 03-4482, 2005 WL 1353527 (E.D. Pa. May 31, 2005).

letter, was sufficient to corroborate plaintiff's testimony of non-receipt).

Defendant has submitted sufficient evidence to trigger the mailbox rule and create a rebuttable presumption that Sheikh received the cancellation notice. In addition to submitting the May 6, 2005 cancellation letter, Defendant has presented the deposition testimony of Traveler's employee Roberta Collins, in which she states that she personally prepared, printed, verified, and mailed the notice of cancellation to Mr. Sheikh. (*See* Collin's Dep. at 34, 51, 62-63, 68.) In corroboration of Collins's deposition testimony, Defendant has submitted a Postal Form 3877, Firm Mailing Book for Accountable Mail, on which Collins listed the items that she brought to the post office on May 6, 2005. (Collins Dep. at 53; Def.'s Mot. Ex. F (Postal Form 3877).) Item six on the form is addressed to Ayyub Sheikh at his correct address. (Def.'s Mot. Ex. F; Pls.' Mot. Ex. A at 20.) Once delivered, the form was date-stamped by the Glen Falls branch of the United States Postal Service. (Def.'s Mot. Ex. F.) Moreover, Collins's made a notarized declaration on that same day, affirming that all of the items listed on the Form 3877 were in fact delivered to the post office. (*Id.* (Notorized Collins Statement).)

Defendant has further submitted an affidavit by Thomas McGilpin, a Travelers employee familiar with Defendant's cancellation and mailing procedures, which validates that the procedures followed by Collins were the normal business practice for mailing notifications of cancellation at Travelers. (Def.'s Mot. Ex. C ¶¶ 5-7.) McGilpin also declared that Travelers has a policy of noting in a customer's file if a notice of cancellation was returned as undeliverable; no such notation was made on Sheikh's file. (*Id.* ¶ 13.) Defendant's extensive evidence is more than sufficient to invoke

the mailbox rule.⁴

To rebut the presumption that the notice of cancellation was mailed, Plaintiffs have presented affidavits from both Ayyub Sheikh and his wife, Amna Khalid, that neither saw the letter from Travelers. (Pls.' Resp. Ex. G (Khalid Aff.) ¶ 6 & (Sheikh Aff.) ¶ 7.) Khalid's declarations are insufficient to corroborate the testimony of her husband and rebut the presumption that the notice was mailed because, as both Ayyub and Amna have stated, Ayyub cannot read English and relies on his wife to read the mail to him. (Pls.' Mot Ex. A at 64, 85 & Ex. G ¶¶ 5, 6.) Therefore, Amna's testimony does not *corroborate* that of her husband; Amna's testimony is the *only* reliable testimony that the letter was never received. *See Breza*, 828 A.2d at 1135 (“[T]he presumption under the mailbox rule is not nullified solely by testimony denying receipt that the item was mailed.”).

Plaintiffs further argue that Defendant had an obligation to notify Sheikh of the cancellation via telephone.⁵ Although further communication would perhaps have been desirable, Defendant was under no legal obligation to notify Sheikh of the policy cancellation by any means other than a writing mailed to his record address.⁶ 40 PA. CONS. STAT. ANN. § 991.2002.

⁴ Plaintiffs do not dispute that a letter of cancellation was issued on May 6, 2007. (Pls.' Resp. ¶ 5; *see also* Def.'s Mot. Ex. B (Cancellation Letter)). Instead, they contest that the notice was actually delivered to Plaintiffs. (Pls.' Resp. ¶ 5.)

⁵ Plaintiffs premises this argument on the Restatement of Contracts, which states “[u]nless the author provides otherwise . . . an acceptance made in a manner and by a medium invited by an offer is operative . . .” RESTATEMENT (SECOND) OF CONTRACTS § 63. Not only is this provision inapposite, but Pennsylvania statutory law, and not the restatement on contracts, is binding in this matter.

⁶ The parties dispute whether Travelers attempted to communicate with Sheikh by telephone. According to Travelers, at least two telephone calls were made in an attempt to set up an underwriting interview, and the notice of cancellation was sent subsequent to both phone calls. (Pls.' Mot. Ex A at 88 & Ex. C (McGilpin Dep.) at 32.) Sheikh avers that no telephone calls or messages were ever received. This factual dispute is legally irrelevant in light of the

The Court acknowledges the harshness of this outcome for Plaintiffs. Nonetheless, the substantive rules and evidentiary presumptions of Pennsylvania law govern this analysis and mandate this outcome. Because Plaintiffs cannot rebut the evidentiary presumption that the notice of cancellation was mailed and received, Plaintiffs' breach of contract claims must fail.

B. Plaintiffs' Claims for Bad Faith, Violation of the UTPCPL, and Fraud Also Fail

Plaintiffs extracontractual claims also fail. Plaintiffs' claim for bad faith fails because Defendant was under no obligation to provide coverage to Plaintiffs for their accident and, accordingly, Travelers had a reasonable basis for denying coverage. *See Kelly*, 138 F. Supp. 2d at 662-63 (“[I]n order to recover on a claim for bad faith, a plaintiff must demonstrate by clear and convincing evidence that the insurer did not have a reasonable basis for denying a claim . . .”).

Similarly, Plaintiffs' claim under the UTPCPL fails because Plaintiffs have not shown any evidence that Defendant acted with malfeasance. *See Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 307 (3d Cir. 1995) (“In Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the [UTPCPL] and an insurer's mere refusal to pay a claim which constitutes nonfeasance, the failure to perform a contractual duty, is not actionable.”).

Finally, Defendant is not liable under theories of fraud or misrepresentation merely because Travelers's advertisements portray a company worthy of trust.⁷ Defendant was under no statutory

Pennsylvania statute.

⁷ Plaintiffs specifically point to Travelers's slogan: “When you want more than just an insurance company, you are better off under the umbrella.” (Pls.' Mot. at 17.) Sheikh states that they were lured into coverage due to these “enticing words,” and such words proved misleading and an inaccurate representation of Defendant's reliability.

or contractual obligation to pay, and the rhetoric used in Travelers's advertising does not disturb this finding. *See Moser v. DeSetta*, 589 A.2d 679, 682 (Pa. 1991) (“[F]raud is composed of a misrepresentation fraudulently uttered with the intent to induce the action undertaken in reliance upon it, to the damage of its victim.”) (*quoting Thomas v Seaman*, 304 A.2d 134, 137 (Pa. 1973)); *see also Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893, 905 (Pa. 1975) (“[M]isrepresentation must be distinguished from mere ‘puffing.’”). Similarly, the fact that a Travelers representative initially gave Sheikh a claim number for the accident is not tantamount to fraud. *See Moser*, 589 A.2d at 682.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted. An appropriate Order follows.

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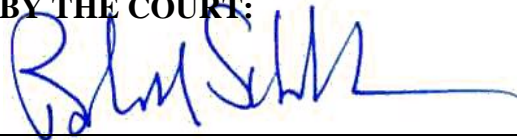
ORDER

AND NOW, this **31st** day of **August, 2007**, upon consideration of Defendant's motion for summary judgment, Plaintiffs' response thereto, and for the foregoing reasons it is hereby

ORDERED that:

1. Defendant's Motion for Summary Judgment (Document No. 15) is **GRANTED**.
2. The Clerk of Court shall close this case.

BY THE COURT:



Berle M. Schiller, J.